

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF KLAMATH

JOHN GILLMAN and BEN DEVRIES,

Plaintiffs,

v.

BOSTON SCIENTIFIC CORPORATION, a
Massachusetts corporation, and DOE 1,

Defendants.

Case No. 11-01195 CV CV

COMPLAINT FOR DAMAGES

1. Products Liability
2. Negligence
3. Loss of Consortium
4. Breach of Implied Warranty
5. Breach of Express Warranty
6. Negligent Misrepresentation
7. Failure to Warn

**NOT SUBJECT TO MANDATORY
ARBITRATION**

Amount of Prayer: \$2,750,000.00

Plaintiffs, JOHN GILLMAN and BEN DEVRIES, complain of defendants, BOSTON SCIENTIFIC CORPORATION, a Massachusetts corporation, and DOE 1, and each of them, and for Causes of Action and allege as follows:

1. The true names, capacities, or involvement, whether individual, corporate, governmental, or associate of the defendant named herein as DOE, is unknown to plaintiffs, who therefore sues said defendant by such fictitious name. Plaintiffs pray leave to amend this complaint to show their true name and capacity, when the same have been finally determined. Plaintiffs are informed and believe, and upon such information and belief, allege, that each of the defendant designated herein as DOE is negligently or otherwise legally responsible in some manner for the events and happenings herein referred to, and negligently or otherwise caused injury and damages legally thereby to plaintiffs as is hereinafter alleged.

2. Plaintiffs are now citizens of and residents within the State of Oregon.

1 3. At all times material, defendants BOSTON SCIENTIFIC CORPORATION is a
 2 corporation organized and existing under the laws of the State of Delaware and the State of
 3 Massachusetts, with its principal place of business in Natick, Massachusetts. BOSTON
 4 SCIENTIFIC CORPORATION has done and is doing business in Oregon and may be served by
 5 delivering a summons and copy of the complaint to its Registered Agent, Corporation Service
 6 Company, 285 Liberty Street N.E., Salem, OR 97301 or its President, J. Raymond Elliott, One
 7 Boston Scientific Place, Natick, Massachusetts 01760, or any other officer or managing agent at
 8 such address.

10 4. At all times material herein, BOSTON SCIENTIFIC CORPORATION includes
 11 any and all parents, subsidiaries, affiliates, divisions, franchises, partners, joint venturers, and
 12 organizational units of any kind, their predecessors, successors and assigns and their officers,
 13 directors, employees, agents, representative and any and all other persons acting on their behalf.

15 5. At all times mentioned herein, BOSTON SCIENTIFIC CORPORATION
 16 conducted regular and sustained business in Oregon by selling and distributing its products in
 17 Oregon.

18 6. Upon information and belief, Defendant DOE 1 is a manufacturer, person, agent,
 19 servant, employee, corporation, partnership or other business entity whose true name is unknown
 20 by Plaintiffs at the present time. Plaintiffs allege, upon information and belief, that, at all times
 21 mentioned herein, DOE 1 conducted regular and sustained business in Oregon by selling and
 22 distributing its products in Oregon to subject them to the jurisdiction of this court. Each
 23 defendant has negligently assisted the named defendant in carrying out the allegations as set
 24 forth below. Alternatively, DOE 1 was an agent or servant of BOSTON SCIENTIFIC
 25 CORPORATION, and was acting within the course and scope of its employment and/or agency
 26 at the times alleges herein. If and when the true identities of such person, servant, employee,
 27
 28

PAGE 2 OF 8 -Complaint for Damages

corporation, partnership or other business entity becomes known to Plaintiffs, they will seek leave of the Court to amend the Complaint to reflect such true names together with appropriate allegations.

7. BOSTON SCIENTIFIC CORPORATION and DOE 1 designed, researched, developed, manufactured, tested, marketed, advertised, promoted, distributed, and sold Advanced Bionics spinal cord stimulator and battery (hereinafter collectively named "stimulator"). Such stimulator purports to be a device surgically placed under the patient's skin to send a mild electric current to the spinal cord to control or relieve chronic pain. The defendants have a duty to design, manufacture, market, and sell the stimulator in a way that is safe for patients.

8. On or about April 3, 2009, Plaintiff JOHN GILLMAN was implanted with a stimulator. Shortly thereafter, such stimulator failed, malfunctioned, was/became defective and/or failed to work properly. Since shortly after such implantation, and continuing, Plaintiff JOHN GILLMAN suffered severe persistent pain, burning sensations, numbness, loss of sleep, and mental and emotional distress. Surgery is required to remove such device.

9. At all times mentioned herein, the stimulator was widely advertised and promoted by defendants as a safe and effective treatment for chronic pain. The stimulator was unsafe for its intended use.

FIRST CAUSE OF ACTION

STRICT PRODUCTS LIABILITY

10. Plaintiff JOHN GILLMAN hereby realleges paragraphs 1 through 9 above.

11. Defendants were the producers, manufacturers, sellers, and distributors of the defective stimulator. The exposure to risk of injury outweighed any benefit from its use. The stimulator was defective because it failed and/or malfunctioned and did not perform in a safe

1 manner. Defendants violated their duty to provide a safe product to Plaintiff.

2 WHEREFORE Plaintiffs pray for a judgment against Defendants as hereinafter set forth.

3 **SECOND CAUSE OF ACTION**

4 **NEGLIGENCE**

5 12. Plaintiff hereby realleges each and every paragraph above.

6 13. Defendants had a duty to exercise reasonable care in the research, development,
7 design, manufacture, testing, marketing, advertising, promotion, sale and distribution of the
8 stimulator.

9 14. Defendants failed to exercise ordinary care in the research, development, design,
10 manufacture, testing, marketing, advertising, promotion, sale and distribution of the stimulator.

11 15. Defendants knew that the failure, malfunction, defectiveness, and/or lack of
12 functioning of a stimulator created a high risk of dangerous side effects.

13 16. Defendants failed to use due care in care in the research, development, design,
14 manufacture, testing, marketing, advertising, promotion, sale and distribution of the stimulator.

15 17. As a direct result of the negligence of defendants, Plaintiff sustained injuries.

16 WHEREFORE Plaintiffs pray for a judgment against Defendants as hereinafter set forth.

17 **THIRD CAUSE OF ACTION**

18 **LOSS OF CONSORTIUM**

19 18. Plaintiffs hereby realleges each and every paragraph above.

20 19. At all times material herein, the Plaintiffs were married and that the Plaintiffs
21 continue to be married.

22 20. As a result of the wrongful and negligent acts of the Defendants, the Plaintiffs
23 were caused to suffer, and will continue to suffer in the future, loss of consortium, loss of
24

1 society, affection, assistance, and conjugal fellowship, all to the detriment of their marital
2 relationship.

3 21. All the aforesaid injuries and damages were caused solely and proximately by the
4 negligence of the Defendants.
5

6 WHEREFORE Plaintiffs pray for a judgment against Defendants as hereinafter set forth.

7 **FOURTH CAUSE OF ACTION**

8 **BREACH OF IMPLIED WARRANTY**

9 10 22. Plaintiff hereby realleges each and every paragraph above.

11 23. Defendants impliedly warranted that their stimulator was merchantable and safe
12 and fit for use and was free of design or manufacturing or distributing defects. They further
13 impliedly warranted that their stimulator would provide relief from chronic pain. Said product
14 was not free of such defects and caused pain and injury to Plaintiff as set forth above.
15

16 24. The Stimulator was defective, unmerchantable, and unfit for ordinary use when
17 sold and/or implanted and subjected plaintiff to severe and permanent injuries. Therefore, the
18 defendants breached the implied warranties of merchantability and fitness for a particular use
19 when the stimulator was defective, malfunctioned, and/or failed to work properly.

20 WHEREFORE Plaintiffs pray for a judgment against Defendants as hereinafter set forth.

21 **FIFTH CAUSE OF ACTION**

22 **BREACH OF EXPRESS WARRANTY**

24 25. Plaintiff hereby realleges each and every paragraph above.

25 26. Defendants expressly warranted to plaintiff and/or his authorized agents, in
26 publications and other communications intended for medical patients, and the general public, that
27 the stimulator was safe, effective, fit, and proper for its intended use.
28

1 27. Plaintiff and his physician reasonably relied upon the skill and judgment of
2 defendants and, upon said express warranty, in using stimulator. The warranty and
3 representations were untrue in that the product caused severe pain and injury to plaintiff and was
4 unsafe and therefore unsuited for the use in which it was intended and caused plaintiff to sustain
5 damages and injury.

WHEREFORE Plaintiffs pray for a judgment against Defendants as hereinafter set forth.

SIXTH CAUSE OF ACTION

NEGLIGENCE MISREPRESENTATION

0 28. Plaintiff hereby realleges each and every paragraph above.

1 29. At all times relevant herein, the defendants represented to plaintiff and his
2 physicians that the stimulator was safe for use in relieving chronic pain, knowing that the
3 stimulators could be defective and/or malfunction and were capable of causing the injuries
4 described herein.

30. The defendants made the aforesaid representations with no reasonable ground for believing them to be true when the data readily available to defendants, and upon information and belief directly available to defendants in the form of adverse reports specifically related to the stimulators showed stimulators to be defective and dangerous when used in the intended manner.

31. The aforesaid representations were made to the physicians prescribing and implanting the stimulators prior to the date they were prescribed and implanted in plaintiff with the intent that plaintiff and his physicians did reasonably rely upon such misrepresentations about the safety and efficacy of the stimulator. Plaintiff and his physician did reasonably rely upon such representations that the aforesaid product was safe for use for relieving chronic pain.

32. The representations by the defendants to plaintiff were false and thereby caused

1 plaintiff's injuries described herein.

2 WHEREFORE Plaintiffs pray for a judgment against Defendants as hereinafter set forth.

3 **SEVENTH CAUSE OF ACTION**

4 **FAILURE TO WARN**

5 33. Plaintiff hereby realleges each and every paragraph above.

6 34. At all times mentioned herein, the Stimulator was and is dangerous and presented
7 a substantial danger to patients who were implanted with the stimulator, and these risks and
8 dangers were known or knowable to defendants at the time of distribution and implantation into
9 plaintiff. Ordinary consumers would not have recognized the potential risks and dangers
10 stimulators posed because the stimulator's use was specifically promoted to improve pain in such
11 patients. The stimulator was used by plaintiff in a way reasonably foreseeable to the defendants.
12 The defendants failed to provide warning of such risks and dangers to plaintiff and his medical
13 providers.

14 WHEREFORE Plaintiffs pray for a judgment against Defendants as hereinafter set forth.

15 **DAMAGES**

16 WHEREFORE Plaintiff pray for a Judgment against Defendants on each of the above-
17 references claims and causes of action as follows:

18 1. For Plaintiff, JOHN GILLMAN, General (non-economic) damages for the
19 past and future damages, including but not limited to pain and suffering
20 for severe and permanent personal injuries sustained by Plaintiff, in the
21 amount of Two Million Dollars (\$2,000,000.00).

22 2. For Plaintiff, JOHN GILLMAN, economic damages for the past and
23 future medical bills in the amount of Five Hundred Thousand Dollars
24 (\$500,000.00).

25
26
27
28
PAGE 7 OF 8 -Complaint for Damages

3. For Plaintiff, BEN DERVIES, General (non-economic) damages for loss of consortium in the amount of Two Hundred Fifty Thousand Dollars (\$250,000.00).
4. For both Plaintiffs, Prejudgment interest as provided by law;
5. For both Plaintiffs, All costs of suit incurred herein;
6. For both Plaintiffs, reasonable attorneys' fees; and
7. For both Plaintiffs, Such other and further relief as this Court may deem just and proper.

Dated this 1st day of April, 2011.

MELINDA M. BROWN, OSB No. 00217
Attorney for Plaintiffs
JOHN GILLEMAN and BEN DEVRIES

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF KLAMATH

JOHN GILMAN and BEN DEVRIES,

Case No. 11-01195CV

Plaintiff,

V.

SUMMONS

BOSTON SCIENTIFIC CORPORATION, a
Massachusetts Corporation, and DOE 1,

Defendants.

TO: BOSTON SCIENTIFIC CORPORATION,
285 Liberty St. NE
Salem, OR 97301

You are hereby required to appear and defend the complaint filed against you in the above-entitled action with thirty (30) days from the date of service of this summons upon you, and in case of your failure to do so, for want thereof, plaintiff(s) will apply to the court for the relief demanded in the complaint.

**NOTICE TO THE DEFENDANT: READ THESE PAPERS
CAREFULLY!**

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal paper called a "motion" or "answer." The "motion" or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff's attorney or, if the plaintiff does not have an attorney, proof of service upon the plaintiff.

MELINDA M. BROWN, OSB#00217
Attorney for Plaintiff
419 Main St.
Klamath Falls, OR 97601
Phone: (541)884-4100
Fax: (541)884-4600
Email: attorneybrown@aol.com

If you have any questions, you should see an attorney immediately. If you need help finding an attorney, you may call the Oregon State Bar's Lawyer Referral Service at (503) 684-3763 or toll free in Oregon at (800) 452-7636.

STATE OF OREGON, County of Klamath) ss.

I, the undersigned attorney of record for the plaintiff, certify that the foregoing is an exact and complete copy of the original summons in the above entitled action. *R. Knudell*

~~MELINDA M. BROWN, Attorney for Plaintiff~~

TO THE OFFICER OR OTHER PERSON SERVING THIS SUMMONS: You are hereby directed to serve a true copy of this summons, together with a true copy of the complaint mentioned herein, upon the individual(s) or other legal entity(jes) to whom or which this summons is directed, and to make your proof of service on the reverse hereof or upon a separate similar document which you shall attach hereto.

MELINDA M. BROWN, Attorney for Plaintiff

HCH 6/07/11 4:48 PM

Case Register..... Klamath County Circuit Court Status Open
 Case#..... 1101195CV Gillman John/Boston Scientific Corporati
 Civil Tort: Products liability

Case Filed Date..... 4/01/11 Starting Instrument.. Complaint
 Case Started Date... 4/01/11 Originating From..... Original filing
 At Issue Date..... Previous Court.....
 First Setting Date.. Previous Court Case#.
 Trial Scheduled Date Master Case Number...
 Trial Start Date.... Relation to Master...
 Length of Trial..... Amount Prayed for.... \$2,750,000.00
 Disposition Date.... Termination Stage....
 Final Order Date.... Termination Type.....
 Reinstated Date.....

Judgment Type.....
 Judgment Status.....
 Judgment Volume/Page.

ROLE PLAINTIFF ATTORNEY
 1 Plaintiff Gillman John Brown Melinda M
 2 Plaintiff Devries Ben Brown Melinda M

ROLE DEFENDANT ATTORNEY
 1 Defendant Boston Scientific Corporation

ROLE OTHER PEOPLE ATTORNEY
 1 Judge Osborne Assigned

ENTER DT	FILE DT	EVENT/FILING/PROCEEDING	SCHD DT	TIME	ROOM
1 4/01/11	4/01/11	Complaint			
2 5/27/11	5/27/11	Return of Service			
		DEF 1 Boston Scientific Corp			
		5/18/11 Served			
		***** END OF DATA *****			

Robert L. Cowling, OSB No. 650257
Internet E-mail address: rlc@roguelaw.com
Eric B. Mitton, OSB No. 065925
Internet E-mail address: ebm@roguelaw.com
Hornecker, Cowling, Hassen & Heysell, LLP
717 Murphy Rd.
Medford, OR 97504
Telephone: 541-779-8900
Fax: 541-779-2982
Attorney(s) for: Defendant, Boston Scientific Corporation

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

JOHN GILLMAN and BEN DEVRIES, Case No.
Plaintiffs, NOTICE TO ADVERSE PARTY OF
v. REMOVAL TO FEDERAL COURT
BOSTON SCIENTIFIC CORPORATION, a
Massachusetts Corporation, and DOE 1,
Defendants.

TO PLAINTIFFS JOHN GILLMAN AND BEN DEVRIES AND THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE THAT Defendant Boston Scientific Corporation filed a Notice of Removal of this action in the United States District Court for the District of Oregon on June __, 2011, under Federal Case No. _____.

A copy of the Notice of Removal filed in the Office of the Clerk of the United States District Court for the District of Oregon, dated June __, 2011, is attached. A copy of this

Page - 1 NOTICE TO ADVERSE PARTY OF
REMOVAL TO FEDERAL COURT
H:\USER\FILES\29988-001\Notice to Adv party re removal.doc

HORNECKER, COWLING,
HASSEN & HEYSELL, LLP
717 Murphy Road
Medford, OR 97504
541-779-8900

Notice has also been filed with the Clerk of the Klamath County Circuit Court of the State of Oregon.

Dated this ____ day of June, 2011.

ERIC B. MITTON, OSB No. 065925
Of Attorneys for Defendant Boston Scientific
Corporation
ROBERT L. COWLING, OSB No. 650257
Trial Attorney
Fax 541-779-2982
rlc@roguelaw.com;ebm@roguelaw.com

Page - 2 NOTICE TO ADVERSE PARTY OF
REMOVAL TO FEDERAL COURT
H:\USER\FILES\29988-001\Notice to Adv party re removal.doc

HORNECKER, COWLING,
HASSEN & HEYSELL, LLP
717 Murphy Road
Medford, OR 97504
541-779-8900

EXHIBIT 4
Page 2 of 3

CERTIFICATE OF SERVICE

I certify that on the _____ day of June, 2011, I caused the foregoing NOTICE TO ADVERSE PARTY OF REMOVAL TO FEDERAL COURT to be served on each of the parties listed below:

Melinda M. Brown, AAL
419 Main Street
Klamath Falls, OR 97601
Fax. No.: 541-884-4600

- By facsimile.
- By depositing said true copy in the United States Post Office at Medford, Oregon, in a sealed envelope with postage fully prepaid thereon, addressed to the following and that between the same post office and the address to which said copy was mailed, there is a regular communication by U.S. Mail.
- By causing to be hand-delivered to the regular office of that party's attorney, a true copy thereof.
- By sending a true copy thereof via overnight courier in a sealed, prepaid envelope, to the regular office of that party's attorney.

ERIC B. MITTON, OSB No. 065925
Of Attorneys for Defendant

CERTIFICATE OF SERVICE
H:\USER\FILES\29988-001\Notice to Adv party re removal.doc

HORNECKER, COWLING,
HASSEN & HEYSELL, LLP
717 Murphy Road
Medford, OR 97504
541-779-8900

EXHIBIT 4
Page 3 of 3

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF KLAMATH

JOHN GILLMAN and BEN DEVRIES,

Plaintiffs,

VS.

Case No. 11-01195CV

**NOTICE THAT ACTION HAS BEEN
REMOVED**

BOSTON SCIENTIFIC CORPORATION, a
Massachusetts corporation, and DOE 1,

Defendants.

1.

Pursuant to 28 U.S.C. § 1446(a), Defendant Boston Scientific Corporation filed a Notice of Removal in the United States District Court for the District of Oregon on June ____ 2011. A file-stamped copy of that Notice is attached as Exhibit 1.

2

The filing of this copy of the Notice effects removal of this case, and, pursuant to 28 USC § 1446(d), "the State court shall proceed no further unless and until the case is remanded."

Dated this day of June, 2011.

ERIC B. MITTON, OSB No. 065925
Of Attorneys for Defendant Boston Scientific
Corporation
ROBERT L. COWLING, OSB No. 650257
Trial Attorney
Fax 541-779-2982
rlc@roguelaw.com;ebm@roguelaw.com

CERTIFICATE OF SERVICE

I certify that on the _____ day of June, 2011, I caused the foregoing NOTICE THAT ACTION HAS BEEN REMOVED to be served on each of the parties listed below:

Melinda M. Brown, AAL
419 Main Street
Klamath Falls, OR 97601
Fax. No.: 541-884-4600

- By facsimile.
- By depositing said true copy in the United States Post Office at Medford, Oregon, in a sealed envelope with postage fully prepaid thereon, addressed to the following and that between the same post office and the address to which said copy was mailed, there is a regular communication by U.S. Mail.
- By causing to be hand-delivered to the regular office of that party's attorney, a true copy thereof.
- By sending a true copy thereof via overnight courier in a sealed, prepaid envelope, to the regular office of that party's attorney.

ERIC B. MITTON, OSB No. 065925
Of Attorneys for Defendant

CERTIFICATE OF SERVICE

H:\USER\FILES\29988-001\CIRCUIT COURT\Notice Action removed.doc

**HORNECKER, COWLING,
HASSEN & HEYSELL, LLP**
717 Murphy Road
Medford, OR 97504
541-779-8900

EXHIBIT 5
Page 2 of 2

CERTIFICATE OF SERVICE

I certify that on the 15th day of June, 2011, I caused the foregoing NOTICE OF REMOVAL to be served on each of the parties listed below:

Melinda M. Brown, AAL
419 Main Street
Klamath Falls, OR 97601
Fax. No.: 541-884-4600

By facsimile.

By depositing said true copy in the United States Post Office at Medford, Oregon, in a sealed envelope with postage fully prepaid thereon, addressed to the following and that between the same post office and the address to which said copy was mailed, there is a regular communication by U.S. Mail.

By causing to be hand-delivered to the regular office of that party=s attorney, a true copy thereof.

By sending a true copy thereof via overnight courier in a sealed, prepaid envelope, to the regular office of that party=s attorney.

Eric B. Mitton

ERIC B. MITTON, OSB No. 065925
Of Attorneys for Defendant

CERTIFICATE OF SERVICE
H:\USER\FILES\29988-001\Notice of Removal.doc

**HORNECKER, COWLING,
HASSEN & HEYSELL, LLP**
717 Murphy Road
Medford, OR 97504
541-779-8900